

***United States Court of Appeals
for the Second Circuit***



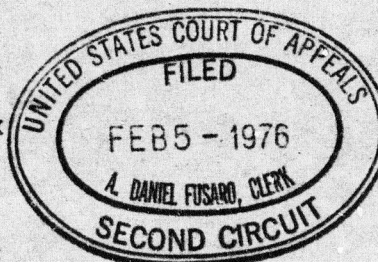
**APPELLANT'S
BRIEF**

76-6008-6013-1028

2/2

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- x
AMREP CORPORATION, : 76-6008
Appellant, :
-v- : 76-6013
FEDERAL TRADE COMMISSION, :
Appellee. :
----- x
UNITED STATES OF AMERICA :
-v- :
AMREP CORPORATION, RIO RANCHO : 76-1028
ESTATES, INC., ATC REALTY CORP., :
HOWARD W. FRIEDMAN, CHESTER CARITY, :
IRVING W. BLUM, HENRY L. HOFFMAN, :
HERMAN B. OBERMAN, SOLOMON H. FRIEND, :
and DANIEL FRIEDMAN, :
Defendants. :
----- x



B
P/S

APPEAL FROM ORDERS OF THE UNITED
STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT

PROSKAUER ROSE GOETZ & MENDELSON
ATTORNEYS
300 PARK AVENUE
NEW YORK, N. Y. 10022

TABLE OF CONTENTS

Statement of Issues	1
Statement of the Case	2
Statement of the Facts	7
Argument	35
I. Judicial Intervention is Authorized and Required to Avoid Action Which Will Invalidate Both Pending Proceedings	35
II. The Conflict Between the FTC and Criminal Cases Requires a Stay of the FTC Proceeding	44
III. A Stay of the FTC Proceeding Will Not Jeopardize the Public Interest	68
Conclusion	74

TABLE OF AUTHORITIES

DECISIONS

<u>Bruno v. Herold</u> , 368 F.2d 187 (2d Cir. 1966).....	41
<u>Campbell v. Eastland</u> , 307 F.2d 478 (5th Cir. 1962), <u>cert. denied</u> , 371 U.S. 955 (1963).....	62
<u>Comprehensive Group Health Services Board v. Temple University</u> , 363 F. Supp. 1069 (E.D. Pa. 1973).....	38
<u>Curcio v. United States</u> , 354 U.S. 118 (1957).....	65
<u>Ecology Action v. U.S. Atomic Energy Commission</u> , 492 F.2d 998 (2d Cir. 1974).....	39
<u>Gordon v. Federal Deposit Insurance Corporation</u> , 427 F.2d 578 (D.C. Cir. 1970).....	44
<u>Kastigar v. United States</u> , 406 U.S. 441 (1972).....	55
<u>Martinez v. Richardson</u> , 472 F.2d 1121 (10th Cir. 1973)....	38
<u>New York Shipping Association v. Federal Maritime Commission</u> , 495 F.2d 1215 (2d Cir.), <u>cert. denied</u> , 419 U.S. 964 (1974).....	39
<u>Ogletree v. McNamara</u> , 449 F.2d 93 (6th Cir. 1971).....	38
<u>Pepsico, Inc. v. Federal Trade Commission</u> , 472 F.2d 179 (2d Cir. 1972), <u>cert. denied</u> , 414 U.S. 876 (1973).....	36, 39
<u>Ryan v. United States Lines Co.</u> , 303 F.2d 430 (2d Cir. 1962).....	41
<u>St. Regis Paper Co. v. United States</u> , 368 U.S. 208 (1961).....	40
<u>Silver v. McCamey</u> , 221 F.2d 873 (D.C. Cir. 1955).....	44, 61-62
<u>Sterling Drug v. Weinberger</u> , 509 F.2d 1236 (2d Cir. 1975).....	39
<u>Texaco v. Borda</u> , 383 F.2d 607 (3d Cir. 1967).....	58-59
<u>United States v. Birrell</u> , 276 F. Supp. 798 (S.D.N.Y. 1967).....	43
<u>United States v. Hasiwar</u> , 299 F. Supp. 1053 (S.D.N.Y. 1969).....	55-56

<u>United States v. Kordel</u> , 397 U.S. 1 (1970).....	44-48, 67
<u>United States v. Simon</u> , 262 F. Supp. 64 (S.D.N.Y. 1966), <u>rev'd</u> , 373 F.2d 649 (2d Cir.), <u>judgment vacated as moot</u> , 389 U.S. 425 (1967).....	42, 59-60, 63-67
<u>White v. Ragen</u> , 324 U.S. 760 (1945).....	49
<u>Wilson v. United States</u> , 221 U.S. 361 (1911).....	65

STATUTES AND REGULATIONS

15 U.S.C. §50.....	40
15 U.S.C. §53(b).....	33, 69
15 U.S.C. §57(b).....	32, 71
15 U.S.C. §1700 <u>et seq.</u>	70
15 U.S.C. §1703.....	20
15 U.S.C. §1705.....	70
15 U.S.C. §1706(c).....	34
15 U.S.C. §1714(a).....	70
18 U.S.C. §1341.....	20
Federal Rules of Civil Procedure 60(b).....	2, 15-16, 40-41
24 C.F.R. 1710.45.....	34, 71
Federal Trade Commission Rules of Practice §3.22(a)....	18
Federal Trade Commission Rules of Practice §3.23(b)....	18
Federal Trade Commission Rules of Practice §3.31.....	31
Federal Trade Commission Rules of Practice §3.38.....	40

MISCELLANEOUS

BNA Antitrust & Trade Regulation Report No. 705 (March 18, 1975).....	52, 72
---	--------

STATEMENT OF THE ISSUES

1. Is it unfair to require appellant to defend itself simultaneously in a massive Federal Trade Commission proceeding, which threatens its very existence, and an equally massive and substantially similar criminal proceeding where: the conflicting pre-trial and trial schedules in both proceedings render it impossible to prepare an adequate defense in either; the indictment of appellant's principal officers has rendered it impossible for appellant to present its best defense in the FTC hearings; the indictment of its general counsel (who had been in charge of the FTC defense) has left appellant without counsel before the FTC; the requirement that appellant participate in discovery and hearings in the FTC proceeding in advance of the criminal case will allow the United States Attorney to gain discovery to which it would not otherwise be entitled under the Federal Rules of Criminal Procedure as well as a "dress rehearsal" of Amrep's cross-examination of the Government's witnesses and Amrep's defense; and the deferral of the FTC proceeding until after the termination of the criminal trial will not result in any prejudice to the FTC or to the public?

2. Did the District Court in the civil case err in its holding that the return of an indictment against appellant and its principal officers, involving issues virtually identical to those involved in an on-going Federal Trade Commission proceeding, rendered moot appellant's motion for a stay of the FTC proceeding pending the outcome of the criminal investigation and required the dismissal of appellant's complaint?

3. Did the District Court in the civil case err in its holding that appellant's subsequent motion to vacate the Court's prior orders and grant a stay of the FTC proceeding pending the outcome of the criminal trial, should be denied on the grounds that the additional conflicts between the FTC and criminal proceedings arising from the return of the indictment presented facts and gave rise to requested relief so different from appellant's prior application as to require appellant to file a new complaint under a new docket number rather than seek the required relief pursuant to F.R.C.P. 60(b)?

STATEMENT OF THE CASE

Appellant Amrep Corporation ("Amrep"), plaintiff in the civil case and a defendant in the criminal case, sought below to obtain relief from the impossible requirement that it defend itself in a complex and protracted proceeding now pending against it in the Federal Trade Commission while simultaneously establishing its innocence of substantially similar criminal charges in a massive 42 page, 80 count indictment recently filed against it in the United States District Court for the Southern District of New York. Since the relief sought by the FTC threatens the very existence of this public company and since the opportunity to present its best defense to the FTC charges was fundamentally impaired by the pendency of the criminal proceeding, Amrep sought a stay of the FTC proceeding pending termination of the criminal trial, now scheduled to commence on October 5, 1976.

In the civil action brought by Amrep to gain review of orders of the FTC Administrative Law Judge denying similar relief, Judge Pierce twice declined to pass upon the merits of Amrep's request. Subsequently, Judge Metzner (to whom the criminal proceeding had been assigned) granted partial relief. Since Judge Metzner's jurisdiction extended only to preventing interference with the criminal case, he also did not pass upon the fairness and validity of the FTC proceeding itself, except insofar as it directly affected the criminal trial. He permitted the FTC proceeding to continue through the presentation of the Government's case-in-chief or through July 30, 1976 (whichever is earlier), but stayed all further FTC proceedings until one month after entry of the jury's verdict in the criminal trial.

Despite the minimal relief granted by Judge Metzner, Amrep will suffer extreme prejudice if it is required to adhere to the excessively compressed schedule for discovery and hearings presently imposed by the FTC. This prejudice would result from the facts that:

(a) the FTC schedule, even as modified by the District Court, conflicts with the schedule for pre-trial proceedings and trial established in the pending criminal case, thus rendering it impossible for Amrep to respond to extensive FTC discovery demands and prepare for, and participate in, FTC hearings scheduled to last three months while simultaneously preparing its defense in the criminal proceedings;

(b) the indictment of Amrep's principal officers (all but one of whom have already pleaded their Fifth Amendment right against self-incrimination before the grand jury) will render it virtually impossible for Amrep to secure essential assistance from them in defense of the FTC proceeding necessary to respond to the FTC's discovery demands or to prepare cross-examination of the Government's witnesses at the FTC hearings until the criminal case has been tried;

(c) the indictment of Amrep's general counsel, who had been in charge of the defense in the FTC proceeding, has left Amrep without representation before the FTC, and Amrep has been unable to obtain substitute counsel because of the unreasonably short FTC time schedule for discovery and hearings;

(d) the continuation of the FTC proceeding in advance of the criminal case would require Amrep to provide the United States Attorney in the criminal case with discovery to which it would not otherwise be entitled under the Federal Rules of Criminal Procedure and with a "dress rehearsal" of Amrep's cross-examination of the Government's witnesses.

In view of the fact that the criminal trial is now scheduled to commence on October 5, 1976, and is estimated to last three to four months, the bifurcated FTC hearing required by Judge Metzner's order will not in any event be con-

cluded before mid-1977. Permitting the FTC proceeding to go forward through presentation of the case-in-chief will not therefore significantly expedite it.

Since both proceedings, moreover, involve substantially similar charges, the Government's case in both will, presumably, be substantially similar. Judge Metzner's denial of an injunction against all further FTC proceedings and his order permitting them to continue through presentation of the FTC's case therefore means that a massive case-in-chief will be presented twice in quick succession -- once by the FTC in the Spring of this year and again by the United States Attorney in the Fall. Each will consume months of time. The FTC estimates 150 witnesses (400a) and three months of hearings in seven cities for its case-in-chief alone (149a). The United States Attorney has estimated six to eight weeks for the criminal case-in-chief (313a) and the District Court has estimated three to four months for the whole trial (334a).

The FTC's attempt to compress discovery, preparation and trial into the time available before the criminal trial cannot fail to invalidate both proceedings on grounds of inadequate time and the conflicting burdens of each case alone, aside from the other reasons set forth above for preventing simultaneous prosecution. If, however, the FTC proceeding is stayed until after the criminal trial by an injunction conditioned on the parties' agreement to permit appropriate use of the transcript as evidence in the FTC

case, then there will be little or no delay of the FTC case. Indeed, as we show below, the FTC hearing and any related restitution hearing can be significantly expedited.

Moreover, the powers of the FTC and another federal agency to obtain or grant preliminary relief pending final adjudication of the FTC complaint provide ample means to protect the public interest in the interim if that were deemed necessary. Despite its claim of great urgency here, the FTC has never sought such relief although its proceeding has been pending almost three years. Indeed, prior to the indictment it made no effort at all to prosecute this case diligently, at one point permitting it to lie dormant for nine months. Thus, what appears to be involved here is merely an unseemly bureaucratic race between two Government agencies which cannot agree on an orderly procedure which will not impair the right of a defendant to prepare adequately and present its best defense.

The Orders Appealed From

Amrep appeals from:

(a) Orders of the United States District Court for the Southern District of New York (Pierce, District Judge) in the civil case, dated November 3, 1975 and entered November 7, 1975, denying Amrep's motion for a preliminary injunction against the Federal Trade Commission proceeding pending the outcome of the criminal investigation and dismissing Amrep's complaint as moot.

(b) An order of the United States District Court for the Southern District of New York (Pierce, District Judge) in the civil case, dated January 7, 1976 and entered January 9, 1976, denying Amrep's motion, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, to vacate the November 7 orders dismissing the complaint and denying a preliminary injunction; and

(c) So much of the order of the United States District Court for the Southern District of New York (Metzner, District Judge) in the criminal case, entered January 15, 1976, as denied Amrep's motion for a stay of the FTC proceeding pending the outcome of the criminal trial.

STATEMENT OF FACTS

Amrep's principal business is the subdivision of large tracts of land, the sale of lots, and the construction and sale of single family houses and condominium apartments. In addition, Amrep constructs industrial and recreational facilities on its land.

Amrep currently has three subdivisions in various stages of development. Its principal development is Rio Rancho Estates, located near Albuquerque, New Mexico. The others are Silver Springs Shores, located near Ocala, Florida, and Eldorado at Santa Fe, located near Santa Fe, New Mexico, which is in an early stage of development.

Rio Rancho consists of about 91,000 acres. As of April 30, 1975, 35,813 lots at Rio Rancho had been sold and conveyed to purchasers while an additional 41,103 lots had been sold pursuant to installment sales contracts which had not then been paid in full. Silver Springs Shores consists of approximately 18,500 acres. As of the same date, 3,042 lots at Silver Springs Shores had been sold and conveyed to purchasers while an additional 16,576 lots had been sold pursuant to installment sales contracts which had not then been paid in full.

Although the Government contends that Amrep is selling worthless homesites, over 5,000 people now live at Rio Rancho and approximately 1,000 live at Silver Springs Shores. Amrep has constructed a golf course, a clubhouse and a motel at Rio Rancho and at Silver Springs Shores. In addition, at Rio Rancho it has built a 44,000 square-foot shopping center and two office buildings, one of which houses a medical center serving the local community.

FTC Investigation

In April 1973, the FTC began formal investigative proceedings with respect to a great variety of Amrep's sales and development practices covering tens of thousands of sales over a period of years. Despite its present claims of great urgency and injury to the public interest, the FTC's investigation of Amrep continued sporadically for approximately two

years before an FTC complaint (4a), initiating the adjudicative phase of those proceedings, was issued on March 11, 1975.

Grand Jury Investigation

Even as the FTC investigation of Amrep was progressing, the Government commenced a second investigation into its activities, this time before a federal grand jury sitting in the Southern District of New York. The grand jury investigation began in March 1974 and spanned more than 19 months. During the course of that investigation, the company was compelled to produce tens of thousands of documents. In addition, dozens of witnesses were called to testify. Among these witnesses were the seven principal officers and former officers of Amrep who have since been indicted. Six of these seven defendants invoked their Fifth Amendment right against self-incrimination before the grand jury.

Amrep's First Motion for a Stay

In the spring of 1974, Amrep found that it was required to respond to the grand jury's demands for information as well as an investigational subpoena that just had been served by the FTC. On June 11, 1974, it moved to quash the pending FTC subpoena and stay the FTC proceeding.

Although the FTC now argues that any delay of its proceeding would be detrimental to the public interest, the investigation ground to a halt for a period of nine months

while Amrep's motion to stay and quash remained under consideration. In March 1975, the FTC withdrew the investigational subpoena, issued a formal complaint (4a), and then informed Amrep that the motion to quash was moot. It denied the motion to stay (36a) primarily on the ground that the Commission's action was "not necessarily duplicative of the grand jury investigation" (37a) -- a prediction subsequently proved erroneous by events.

After the issuance of the complaint, the FTC ended its nine month hiatus and resumed the investigation by serving a massive new subpoena duces tecum. In the meantime, all discovery sought by Amrep was deferred.

The Second Motion for a Stay

Concerned that publicity generated by the FTC complaint would prejudice the grand jury and hampered in its defense of the FTC action by the fact that certain of its key executives had been informed that they were targets of the grand jury investigation, Amrep again moved on May 27, 1975 to stay the FTC proceeding pending the determination of the grand jury investigation and "any indictments which may result therefrom" (38a).

By order dated June 27, 1975 (55a), the Administrative Law Judge ruled that Amrep was not entitled to a stay as a matter of law and certified to the Commission the question

of whether the stay should be granted as a matter of administrative discretion or policy. In the course of his opinion, the Administrative Law Judge noted that no criminal indictments had issued and added, "[I]t seems plain that if any [indictments] do issue the charges will be different from those alleged in the Commission's complaint" (60a). That prophetic premise of the decision has similarly been completely undermined by the indictment which has now been filed.

The Commission issued an order on July 29, 1975 (64a), on the discretionary issue certified to it, denying Amrep's motion for the stay for the reasons stated by the Administrative Law Judge in his opinion.

The Pending Civil Case

In an effort to gain review of the FTC orders, Amrep then filed a complaint (67a) in the United States District Court for the Southern District of New York seeking a stay of the FTC proceeding "during the pendency of the criminal investigation" (69a). Accordingly, on August 20, 1975, Amrep moved for a preliminary injunction granting a stay of the FTC proceeding "pending determination of [the] criminal investigation" (70a). The FTC then cross-moved to dismiss the complaint (72a).

On October 28, 1975, the grand jury investigation came to an end with the filing of the criminal indictment

(74a) against Amrep, two of its subsidiaries and its principal officers, including its general counsel, Solomon H. Friend, who had been in charge of Amrep's defense in the FTC proceeding from its inception two and one-half years earlier.* By orders dated November 3, 1975 (203a, 204a), Judge Pierce then dismissed the complaint and denied Amrep's motion for a preliminary injunction on the ground that the filing of the indictment had rendered the action moot.

FTC Refusals to Stay Its Proceedings

After the indictment was filed, Judge Metzner established, on November 18, 1975, a schedule for pre-trial discovery and other motions and for trial of the criminal proceeding, which required defendants to serve their substantive motions and discovery and other pre-trial applications by January 23, 1976.** The Court acceded to the Government's request that it have until March 15, 1976 to answer the motions. In view of the facts that the Court would require time for disposition of the motions, that discovery would then follow such disposition (probably in late April or May), that the trial was estimated to last three to four months,

* Mr. Friend has been an active trial attorney for over 20 years with extensive litigation experience before government regulatory agencies, including the FTC.

** Subsequently, Judge Metzner ruled that motions for discovery and to compel responses to Amrep's demand for a bill of particulars were to be made by February 5, 1976.

and that it would be difficult to obtain jurors for a long trial during July and August, Judge Metzner scheduled the trial of the indictment to begin on October 5, 1976 (303a).*

Despite the fact that the Administrative Law Judge in the FTC proceeding had been advised of the criminal trial schedule and had been requested to give Amrep the opportunity to move for an order to prevent conflict between the two proceedings, he went ahead on December 2, 1975 and established a pre-trial and hearing schedule (338a) in the FTC proceeding which would have totally occupied the time for preparation in the criminal action. The schedule would have required Amrep, beginning in January 1976, to respond to FTC discovery demands (including massive subpoenae duces tecum, Requests for Admissions and depositions) on a week-to-week basis for two months. Amrep would then be allowed one month to prepare for trial after receipt of a list of 150 proposed FTC witnesses and an exhibit list (the only discovery granted Amrep during the entire pendency of the FTC proceeding). Finally, it would be required to participate in FTC hearings estimated to last three months for the case-in-chief alone and, after a six-week adjournment (202a) for its preparation, to present its defense estimated to last two months (496a).

* In view of the fact that Amrep was required to seek a stay of the FTC proceeding first in the FTC itself and then in the civil case in the District Court (see Point I, infra), the problems created by the FTC schedule were not raised before Judge Metzner on November 18 since Amrep was not (and is not now) seeking a delay of the criminal trial because of the conflict with the FTC schedule.

Even if it were possible for Amrep to meet those requirements despite the recent indictment of its counsel in the FTC proceeding and the necessity of obtaining new counsel, it was apparent that the FTC hearings probably could not conclude prior to the commencement of the criminal trial and, in any event, would have left no time for the preparation of Amrep's defense in that case.*

The Administrative Law Judge reserved for a later date consideration of Amrep's claims that the criminal indictment precluded compliance with the schedule established. Amrep was to attempt to comply in the interim, despite the fact that it would prevent adequate preparation in the criminal case.

* The FTC's claim that Amrep somehow acquiesced in the fixing of a prior schedule which would have also denied it sufficient time to prepare is misleading and baseless. On October 30, 1975 -- barely 48 hours after the indictment of its counsel, Solomon H. Friend -- Amrep was required to appear with complaint counsel before the Administrative Law Judge. Mr. Schreier, one of Mr. Friend's assistants, opened the conference by advising the Administrative Law Judge of the devastating effect that Mr. Friend's indictment had on Amrep's defense. (Mr. Schreier stated: "I really do not know where I am going to be going in view of the criminal indictment in this case." (120a)). Although the Administrative Law Judge promised not to put "instant time pressure" on Amrep (121a), he nevertheless refused any adjournment with the comment "I have not been enjoined [by Judge Pierce, before whom Amrep's motion for a stay was then pending]" (120a). At that point, Mr. Schreier had the choice of excusing himself from any further proceedings, which would have left Amrep without any counsel at the conference, or remaining in order to represent Amrep as best he could under the circumstances. That he chose to remain, and was present when the Administrative Law Judge proceeded to fix an extremely compressed schedule for discovery and hearings, should not now be construed as an acquiescence by Amrep in that schedule. Proceeding at that time, immediately after the indictment of Amrep's counsel, was an overreaching which impaired Amrep's right to counsel and should not be condoned.

Since it was apparent that the conflicting FTC and criminal schedules would render it impossible to prepare and present adequate defenses in both proceedings, Amrep applied to the Administrative Law Judge, by motion dated December 19, 1975, for a stay of the FTC proceeding pending termination of the criminal trial. Since the first discovery deadline imposed on Amrep by the December 2 order was January 9, 1976, Amrep also moved for an immediate stay of all discovery in the FTC proceeding pending determination of Amrep's motion. By decision dated December 29, 1975 (355a), the Administrative Law Judge denied Amrep's motion for an immediate stay of all discovery. Amrep then applied to the Commission for immediate review of this order (357a); the Commission later denied Amrep's motion, as well (361a).

The Application for an Injunction in the Civil Case

With the then effective January 9 discovery deadline fast approaching, Amrep returned to the District Court. In the belief that the indictment had not rendered the action moot, as Judge Pierce had held, and in view of the changed circumstances since the date of Judge Pierce's November 3 orders (including the establishment of conflicting pre-trial and trial schedules in the FTC and criminal proceedings, Amrep's inability to retain substitute counsel to defend the FTC proceeding because of the inordinately short deadlines imposed, and the refusal of the FTC to grant an interim stay), Amrep requested that, pursuant to Rule 60(b) of the

Federal Rules of Civil Procedure, Judge Pierce vacate his prior orders, enjoin the FTC proceeding pending the outcome of the criminal trial, and grant a temporary stay of the FTC discovery pending the determination of Amrep's motion (364a).

By order dated January 7 and entered January 9, Judge Pierce denied Amrep's motion for a preliminary injunction, and its application for a temporary stay of FTC discovery, on jurisdictional and procedural grounds. Despite contrary decisions of this Court (see Point I, infra), Judge Pierce held that Amrep's notice of appeal from the District Court's November 3 orders precluded him from passing on Amrep's motion and that therefore Amrep could seek post-judgment relief only in the Court of Appeals; and despite the fact that Amrep was seeking relief substantially similar to that sought previously (i.e., a stay of FTC proceedings until the criminal proceeding could be disposed of) and that the only new matter before the District Court consisted of additional proceedings in the FTC and criminal cases since the date of its prior orders, Judge Pierce held that the present application was so different from the prior application as to require Amrep to file a new complaint under a new docket number rather than seek the required relief pursuant to Rule 60(b) (416a-418a). Judge Pierce expressly foreswore a determination on the merits of Amrep's motion (419a).

The Application for an Injunction in the Criminal Case

Having thus failed to secure the necessary interim relief from Judge Pierce, Amrep presented an application for similar relief to Judge Metzner. On January 6, 1976 Judge Metzner granted a temporary restraining order preventing the FTC from enforcing its discovery deadlines against Amrep pending his determination of Amrep's motion for a stay of the FTC proceeding pending the outcome of the criminal trial (362a).

After hearing argument on January 9, 1976 (403a), Judge Metzner issued an order dated January 15, 1976 (479a) granting partial relief. He permitted the FTC proceeding to continue through the presentation of the Government's case-in-chief or July 30, 1976 (whichever is earlier) and stayed all further FTC proceedings until one month after entry of the jury's verdict in the criminal trial (488a). As we show below, this bifurcation of the FTC proceeding neither adequately protects Amrep's rights nor significantly expedites the FTC hearings.

In view of this Court's recognition that a criminal court has jurisdiction to enjoin a parallel civil proceeding only as it may interfere with the criminal trial (see Point I, infra), Judge Metzner stated that his sole concern was the effect of the FTC proceeding on the validity of the criminal trial, not whether the FTC proceeding itself was being conducted in an invalid and unfair manner (428a). Thus, Judge Metzner

did not pass at all upon those issues relating to the fairness of proceeding in the FTC case with the criminal case pending and the effect of doing so on the validity of the FTC proceeding.

Subsequent FTC Proceedings

By order dated January 15, 1976 (495a), the Administrative Law Judge "disposed" of Amrep's December 19, 1975 motion, by referring it to the Commission for decision. Thus, he stated his belief that Amrep's motion for a stay involved a matter of administrative discretion, which he lacked authority to rule upon, and he therefore certified it to the Commission for decision in accordance with Section 3.22(a) of the FTC Rules of Practice (507-508a).

The Administrative Law Judge further stated that, if the questions presented by Amrep's motion were to be treated as a matter of law or judicial discretion, then the motion would be denied and an immediate interlocutory appeal to the Commission would be granted pursuant to Section 3.23(b) of the FTC Rules of Practice (508a), which provides for immediate appeals where "the rule involves a controlling question of law or policy as to which there is a substantial ground for difference of opinion and [where] an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy."

The Administrative Law Judge stressed that, since the FTC investigation pre-dated the grand jury investigation, the FTC proceeding should be permitted to continue as scheduled upon "the basic principle that priority of time ordinarily establishes priority of right" (499a).

Despite the fact that the Administrative Law Judge felt that the issues presented by Amrep's motion were either beyond his competence to decide or that they were of sufficient importance to be the subject of an appeal to the Commission, he nevertheless denied a temporary stay of the FTC proceeding and required Amrep to comply with the fast-approaching discovery deadlines pending the Commission's decision (514a). The Commission similarly denied Amrep's motion for an interim stay of discovery (516a). To date, the Commission has rendered no decision on the interlocutory appeal.

On January 27, this Court granted a stay of the FTC proceeding pending determination of the instant appeal.

The Indictment and the FTC Complaint

The indictment that the grand jury handed down raises a myriad of issues in its 80 counts and 42 pages of allegations. It names Amrep, two of its subsidiary corporations, and seven of its past and present executives as defendants. It challenges actions going back to January 1, 1961, asserting that the indictees, together with certain

unnamed individuals, engaged in a scheme to defraud Amrep purchasers for that entire 15 year period in violation of the mail fraud statute (18 U.S.C. §1341) and the Interstate Land Sales Full Disclosure Act (15 U.S.C. §1703). The indictment calls into question an enormous number of the sales and development practices followed by the company during that 15 year period.

The indictment and the FTC complaint essentially attack the same sales and development policies and practices of Amrep (see 492a for a schedule comparing the major allegations in the indictment and complaint) although the FTC complaint attacks a few others in addition and includes Amrep developments in addition to its major community, Rio Rancho, which is the object of the allegations of the indictment.

The indictment calls these sale practices "fraudulent". The complaint calls them "deceptive". The indictment and the complaint track each other so closely that they frequently employ almost identical language. For example, the FTC complaint alleges:

"Respondent's contracts contain a six-month refund provision according to the terms of which the purchasers must visit the lot in order to obtain a refund of all monies paid under the contract. Respondent conducted tours to its subdivisions for purchasers ostensibly so that purchasers might examine their land and decide whether or not to request cancellation of the contract. However, respondent actually uses these tours

to sell purchasers more land, and to discourage such purchasers from exercising their cancellation privilege." (§42)*

The indictment contains the following allegation:

"The defendants and co-schemers would and did require the purchaser to visit the subdivision in order to cancel and obtain a refund, and this was done for two purposes, ... (b) so that defendants and co-schemers could organize and operate carefully controlled and supervised tours during which they could and would both discourage cancellations and sell additional land to the persons on these tours by subjecting them to further and similar fraudulent sales presentations, and by carefully supervising and controlling the movements and activities of the persons on these tours..." (§18(g)(xvi))

They both allege basically that Amrep sold lots in its subdivisions as homesites or worthwhile investments which were of little or no use as homesites and valueless as investments, that the lots were sold for substantially more than they were worth and that purchase of such lots was a poor investment that would not appreciate in value over time. (Complaint §§20, 24; Indictment §§15, 18(o)). They also allege that Amrep falsely represented that the purchase of its lots would be a good investment (Complaint §11; Indictment §§14, 15), that purchasers would be able to resell their lots without difficulty if they wished to do so (Complaint §13; Indictment §15), and that the value of the land in its subdivisions was increasing at a rate

*As a matter of convenience, references are to paragraphs in the FTC complaint (4a-35a) and the indictment (74a-115a).

comparable to the rate of increase of land in certain other areas and more than other types of investments (Complaint ¶18; Indictment ¶18(h), (i)).

Both the FTC complaint and the indictment also allege that Amrep employed high pressure sales tactics to sell its land. They criticize the manner in which Amrep invited prospective purchasers to dinner without advising them that the purpose of the dinners was to "induce" them to buy land (Complaint ¶¶9, 10; Indictment ¶18(g)). They also allege that Amrep falsely represented that lots in "choice" or "desirable" locations were being sold quickly and that prospective purchasers would have to sign a sales contract immediately in order to be assured of obtaining a prime site (Complaint ¶¶28, 30; Indictment ¶18(g)(ix), (x), (xi)). The FTC complaint and the indictment also allege that Amrep salesmen discouraged prospective purchasers from reading the property reports and other pertinent literature that government regulations required be made available and discouraged prospective purchasers from consulting with lawyers or financial advisors before signing a sales contract (Complaint ¶47; Indictment ¶18(g)(viii)).

The Conflict Between the FTC
Proceeding and the Criminal Trial

The conflicting schedules now imposed by the Administrative Law Judge and the criminal trial judge render it impossible for Amrep to comply adequately with either.

Even to the extent Judge Metzner granted relief, the effect of his decision is to give Amrep a scant two months of unobstructed time to prepare its defense in a criminal trial estimated to last three to four months. Thus, once the FTC proceeding is temporarily stayed after July 30, 1976, only August and September will remain before the commencement of the criminal trial on October 5, 1976. During the additional six months prior to trial, Amrep will be occupied on a week-to-week basis in responding to FTC discovery demands and then preparing for and participating in the FTC hearings, scheduled to consume three months. If even the limited relief accorded by Judge Metzner were reversed and the FTC proceeding were permitted to proceed beyond July 30 for presentation of Amrep's defense, all the time for criminal preparation and probably part of the time during which the criminal trial is to proceed will be consumed by the FTC case.

Thus, on the first discovery deadline imposed by the Administrative Law Judge, Amrep is to answer "item by item" a 12-page statement of alleged deficiencies in its return to a massive documentary subpoena previously issued and respond to a new subpoena duces tecum. One week later, it must answer or object to 90 pages of Requests for Admissions containing 864 separate items. One week after these answers or objections are due, it will be served with complaint counsel's application for depositions of 11 of its officers and employees which it must answer at the same time that it is preparing these

individuals, who are located in three different cities, to testify. Their testimony, to the extent the application is granted, is to be taken in those cities in a 10-day period commencing two and one-half weeks after the filing of the application. (509a, 338a) Thus, under the Administrative Law Judge's schedule, completion of the FTC's discovery would require two months or more of intense activity out of the eight months remaining before the criminal trial.

Two weeks after the FTC depositions, and after three years of investigation and post-complaint discovery by the FTC, Amrep is to receive the only discovery which it is accorded under the pre-trial schedule, a witness list containing approximately 150 names and an exhibit list (400a). Thirty days thereafter, Amrep must be ready for trial (509a, 338a). Thus, despite several requests by Amrep for discovery after the filing of the FTC complaint and prior to the fixing of the discovery and trial schedule, Amrep will have only 30 days to attempt to interview or depose 150 witnesses, who are presumably scattered across the country, and to prepare their cross-examination.

Complaint counsel have stated that they will then require three months for the presentation of their case-in-chief, which is to take place in Albuquerque and Santa Fe, New Mexico (five weeks); Branson, St. Louis and Kansas City, Missouri; Ocala, Florida; and, finally, New York City (149a). With necessary travel time and other expected adjournments (202a), these three months of actual hearings

will necessarily extend over a longer period before the case-in-chief is concluded. If, with over six of the eight months remaining before the criminal trial already pre-empted, Amrep is required to go forward with the six weeks allotted by the Administrative Law Judge for the preparation of its defense (202a) and the two months he estimates for its presentation and for rebuttal (496a), then no time is left for criminal preparation. Indeed, both trials would be going on at the same time.

If Amrep had not suffered the disruption caused by the indictment of its principal counsel in the FTC proceeding and if simultaneous pre-trial proceedings and preparation were not required in the criminal case, such a pre-trial schedule would still be impossible to meet. As set forth more fully in a letter to the Administrative Law Judge dated December 12, 1975 (342a), our law firm has concluded that it could not responsibly undertake to meet the prescribed pre-trial schedule and be prepared for trial in the minimal time allowed in a case of this magnitude and complexity.* Amrep thus still faces the problem of replacing prior trial counsel, now under indictment, with new counsel, if any, who believes such a schedule can be met. To date, two other firms, Simpson Thacher & Bartlett and Weil Gotshal & Manges, have also declined to

* In addition to representing Amrep in the criminal proceeding, we undertook to represent Amrep only for the purpose of its applications for a stay of the FTC proceeding in view of the imminence of the discovery deadlines imposed by the Administrative Law Judge.

represent Amrep in the belief that the FTC's compressed discovery and hearing schedule would be impossible to meet, especially in view of the indictment of Amrep's principal officers.

The FTC is attempting to resolve the difficult problem of the simultaneous pendency of two major proceedings, involving the same numerous and complex allegations, by the simple expedient of attempting to compress the FTC proceeding into the short time available before the criminal trial. Such a course, if permitted to continue, will inevitably lead to the invalidity of both proceedings on the ground that Amrep does not have sufficient time to prepare adequate defenses in both.

There are, in addition, other reasons for deferring the FTC proceeding. One of these is the enormous problem in defending the FTC case while all its top officers are themselves under indictment.

Amrep's Indicted Officers

The indicted individuals are, and for the last decade have been, the key executives of the corporation. (See 494a for a chart of the positions held by the individual indictees since 1972). Together, they represent the entire Executive Committee of Amrep's Board of Directors; all but one of the corporation's inside directors; and all of its senior executive officers. They are:

<u>NAME</u>	<u>TITLE</u>	<u>DATES</u>
Irving W. Blum	Chairman of the Board	3/26/68 - Present
Howard W. Friedman	President	3/26/68 - Present

<u>NAME</u>	<u>TITLE</u>	<u>DATES</u>
Chester Carity	Executive Vice President	3/26/68 - Present
Daniel Friedman	Treasurer Vice President Sr. Vice President, Sales	3/26/68 - 9/30/71 12/14/70 - 2/6/73 2/6/73 - Present
Solomon H. Friend	Vice President & General Counsel Sr. Vice President & General Counsel	2/2/70 - 2/6/73 2/6/73 - Present
Henry L. Hoffman	Sr. Vice President	3/26/68 - 9/20/74

Other than minor officials such as Assistant Vice Presidents, Assistant Secretaries, Assistant Treasurers and the Controller, the only remaining unindicted officers are the vice presidents in charge of administration, personnel and finance (treasurer), respectively. None of these three men has a rank or level or scope of responsibility equal to that of any of the indictees.

In view of the fact that the allegations in the FTC complaint challenge Amrep's basic policies and practices, the testimony and active assistance of the individual indictees clearly are essential if Amrep is to present its best defense. Indeed, it is these men who the Government has identified in its indictment as being the persons most responsible for formulating and implementing the very policies and practices which are being challenged by both the FTC and the United States Attorney. Without their knowledge and assistance

Amrep cannot respond to the FTC's extensive discovery demands or prepare cross-examination of the FTC's witnesses with the information which will best refute the charges made against it and counteract the testimony which may be offered in support of these charges.

If, in addition, Amrep is required to present its own case in defense before the criminal trial, contrary to the partial relief granted by Judge Metzner, the testimony of its principal officers would obviously constitute a major part of its case. Without such testimony, and the assistance of the officer group in identifying other important sources of defense testimony, Amrep obviously cannot adequately defend itself. In a case as massive and complex as this, where the very solvency of this publicly held company is at stake,* it is inconceivable that Amrep should be compelled to proceed without the full assistance of its principal officers.

However, their essential assistance in preparing responses to the FTC's discovery demands and cross-examination of the Government's witnesses is severely limited during the pendency of the criminal case. Their time during the forthcoming months must, of course, be largely devoted to preparing their own individual defenses. Moreover, they must, of necessity, be concerned that information they

* The indictment alleges that Amrep has improperly received in excess of \$200,000,000 (76a) and the FTC has indicated that it will seek restitution of all monies improperly received (464a-465a).

would provide the corporation's counsel for disclosure and use in the FTC proceeding, whether by way of responses to discovery demands or preparation of cross-examination, will be construed as a waiver of their Fifth Amendment right against self-incrimination or will provide the prosecutor in the criminal case with pre-trial discovery to which it is otherwise not entitled under the Federal Rules of Criminal Procedure.

Their testimony as Amrep's witnesses, if the FTC proceeding is permitted to proceed beyond the case-in-chief, would be completely unavailable because of their privilege against self-incrimination. Indeed, when summoned before the grand jury, all but the corporation's general counsel invoked their Fifth Amendment right rather than risk making any statements that might incriminate them. Thus, the essential free access of the corporation's attorneys to the full knowledge, assistance, and testimony of its principal executives is largely impaired until the criminal case is tried.

That access to these men is essential in order adequately to prepare responses to the FTC's discovery demands can be illustrated by the use of two examples -- one each from the FTC's Report on Deficiencies in Respondent's Subpoena Return ("Deficiency Report") (295a) and the FTC's Request for Admissions (205a). In the Report on Deficiencies, complaint counsel assert that Amrep has failed to produce

documents, which must exist, dealing with its sales and pricing policies. They state:

"Page 301 of the 'Office Procedures Manual' received under Specification Nineteen unequivocally states: 'The dinner party is the center of our highly specialized selling system.' Yet respondent would apparently have us believe that this 'highly specialized selling system' is never discussed by committee or individual memo. No document received implements, explains or describes either the origination, development or operation of the policies and mechanism that have generated literally hundreds of millions of dollars in land sales. Did the dinner parties and home presentation programs operate for nearly a decade by word of mouth? This is preposterous.

The same is true for materials relating to price determination. We have received nothing more than the vague summations alluded to above and after-the-fact lot pricing announcements -- nothing regarding policy, rationale or purpose." (296a)

Amrep has now been ordered to explain why these documents do not exist and why their absence is not "preposterous". It must, in essence, explain how the selling system was developed and communicated and pricing policy determined without extensive documentation.

Obviously, Amrep's Senior Vice President for Sales and its Executive Committee are prime sources of such information. But they are all under indictment, charged with originating the very policies about which the FTC now seeks information. None of these corporate officers can sign an affidavit or otherwise testify or supply information without waiving his

privilege against self-incrimination or otherwise prejudicing his defense.

Similarly, complaint counsel's Request for Admissions calls on Amrep to admit that it "maintained control" over the business operations and policies of its various subsidiary corporations. (See, e.g., Requests Nos. 48 and 66) (212a, 215a). The Request for Admissions also requires that Amrep admit or deny statements such as the following:

"Request No. 199: Advertisements, promotional literature and reports used by H.C.F. Realty Corp. to advertise and promote the sale of land at one or more of the subdivisions owned by AMREP Corporation or its subsidiaries, are prepared by AMREP Corporation or are submitted to officers, directors or employees of AMREP Corporation for review and approval." (228a)

The indictment in the criminal case charges that Amrep issued fraudulent advertisements, promotional literature and reports. No indicted officer of Amrep can either admit such a statement or set forth the relevant facts, as Section 3.31 of the Commission's Rules of Practice requires, without running the risk of incriminating himself. Thus, Amrep finds itself in the wholly untenable position of being unable to respond, with its best statement in defense of its position, to discovery requests by the FTC.

Moreover, any responses which Amrep makes to FTC discovery demands will afford the United States Attorney discovery to which it would otherwise not be entitled in the criminal case.

Furthermore, the United States Attorney will learn this information in the least equitable of situations since Amrep will continue to be bound to limited discovery of the Government's case by the Federal Rules of Criminal Procedure. Moreover, if the FTC is permitted to present its case-in-chief prior to the criminal trial, then the United States Attorney will obtain a "dress rehearsal" of Amrep's cross-examination of the FTC's witness. Finally, if Amrep is required to present its case in defense before the criminal trial, the Government will obtain the most complete discovery possible of every facet of the defense.

The FTC Will Not Be Prejudiced
If Injunctive Relief Is Granted

Judge Metzner's order requiring the FTC to suspend its hearings after the completion of its case-in-chief or on July 30, 1976 (whichever is earlier) precludes conclusion of the FTC hearings prior to the conclusion of the criminal trial. Moreover, even after the second installment of the FTC hearings are concluded after the criminal trial, the FTC will be required to initiate a separate and further judicial proceeding before it can obtain an order directing Amrep to provide restitution to consumers. 15 U.S.C. §57(b). Thus, the question is presented whether allowing the FTC's discovery and case-in-chief to proceed prior to the criminal trial will significantly expedite the FTC proceeding.

Since the FTC and criminal case both involve substantially similar issues and since both are massive proceedings, (the FTC complaint counsel plan to call 150 witnesses during 3 months of hearings and the United States Attorney estimates that its case will take 6 to 8 weeks to present), an injunction conditioned on the parties' agreement to permit appropriate use of the criminal transcript as evidence in the FTC case and the subsequent restitution proceeding will avoid a huge amount of needless duplication. In this way, trial of the criminal case prior to the FTC proceeding would result in no delay of the FTC case and probably would expedite any subsequent restitution hearing.

Nor must the FTC action be tried immediately if the alleged deceptive practices engaged in by Amrep are to be enjoined. The FTC has the power to seek an injunction prior to the FTC hearings, enjoining Amrep from engaging in the practices the FTC now condemns if it "would be in the interest of the public." 15 U.S.C. §53(b). However, during the nearly three years that the FTC has been investigating Amrep, it never has sought an injunction. Surely, if Amrep's alleged practices are so egregious that a trial is now urgent, those practices could have been enjoined years ago. Nothing has occurred to create a need for haste which has not existed for nearly three years.

Similarly, as to the restitution remedy, the FTC has expressly stated that there is no need for injunctive relief.

At a press conference called at the time the complaint was filed, the FTC announced that Amrep had sufficient assets to satisfy a restitution award and that injunctive relief would not be necessary unless and until Amrep began to dissipate these assets. Although the FTC has presumably monitored the financial reports Amrep has been required as a public company to file, it has never made any claim that such dissipation has occurred.

There are, in addition, ample other means to obtain any preliminary relief which may be warranted during the pendency of these proceedings. The land sales industry is highly regulated. Amrep not only is regulated by the FTC; it is also regulated by the Department of Housing and Urban Development ("HUD") under the Interstate Land Sales Full Disclosure Act. Under 15 U.S.C. §1706(c) and 24 C.F.R. 1710.45, HUD's Office of Interstate Land Sales Registration has the power to enjoin Amrep from selling its land by suspending statements required to be filed with it if it finds that the corporation has failed to make full disclosure of facts bearing on those sales. Should the public interest warrant it at any time HUD can be expected to intervene.

That HUD's power to suspend sales is not illusory has been made clear on at least one occasion where Amrep is concerned. In April 1975, Rio Rancho Estates, Inc., a subsidiary of Amrep, prepared an amendment to the Statement of Record which it was required to file with HUD's Office of

Interstate Land Sales Registration. Finding that the amendment failed to disclose certain relevant matters and that it had not set forth the fact that the FTC had issued a complaint against Amrep, HUD's Office of Interstate Land Sales Registration suspended all sales of land at Rio Rancho from April 23, 1975 to May 8, 1975, when the amendment was corrected.

ARGUMENT

POINT I

JUDICIAL INTERVENTION IS AUTHORIZED
AND REQUIRED TO AVOID ACTION WHICH WILL
INVALIDATE BOTH PENDING PROCEEDINGS

Despite its repeated attempts, Amrep has been unable to obtain any determination by the Federal Trade Commission of the validity of its orders at issue -- orders which require Amrep simultaneously to attempt to defend both the administrative proceeding and the criminal charges at the same time despite the impossibility of doing so adequately. The Administrative Law Judge and the Commission itself have taken the extraordinary position that the FTC may issue such orders before considering their fairness and their effect on the validity of both proceedings, i.e., that judgment may issue before deliberation.

These orders would, if not vacated by this Court, so prejudice Amrep in the preparation and presentation of its defenses in the FTC and criminal trials as to injure it irreparably and lead inevitably to the invalidation of

both proceedings. The Federal Courts, exercising their civil and criminal jurisdictions -- both of which have been invoked here -- have the power to, and should, prevent the enforcement of such injurious directives of an administrative agency as are involved here.

Amrep Has Exhausted Its
Administrative Remedies

Any claim that Amrep has not exhausted its administrative remedies is belied by an examination of the past history of this case. After the FTC had previously denied Amrep's June 1974 motion and May 1975 motion for a stay of the FTC proceeding pending determination of the criminal investigation, the criminal indictment was filed on October 28, 1975. The indictment of Amrep and its principal officers, and the resulting conflicting pre-trial and trial schedules in both proceedings, created new and additional reasons for staying the FTC case.

Following the rule enunciated by this Court that new circumstances bearing on the validity of prior administrative action must first be presented to the administrative agency before relief may be sought in the Federal Courts, Pepsico, Inc. v. Federal Trade Commission, 472 F.2d 179, 190 (2d Cir. 1972), Amrep applied to the Administrative Law Judge, by motion dated December 19, 1975, for deferral of the FTC proceeding pending termination of the criminal trial,

and for an immediate stay of all discovery in the FTC proceeding pending determination of Amrep's motion.

The Administrative Law Judge reserved decision on the main motion and denied Amrep's application for an interim stay (355a), thus compelling Amrep to proceed before determining if it were able, or could properly be compelled, to do so. Indeed, only the temporary restraining order issued by Judge Metzner on January 9, 1976, prevented the order of the Administrative Law Judge from taking effect.

When, by order dated January 15, 1976 (495a), the Administrative Law Judge decided that the issues presented by Amrep's motion for a stay were either beyond his competence to decide or that they were of sufficient importance to be the subject of an immediate appeal to the Commission, he nevertheless again denied a temporary stay of the FTC proceeding and required Amrep to comply with the fast-approaching discovery deadlines pending the Commission's decision (508a). The Commission subsequently denied, as well, Amrep's motion for a temporary stay pending its determination of the appeal (516a).

Only this Court's order of January 27 staying the Commission from compelling Amrep to meet the discovery deadline that very day, prevented the order from taking effect before its validity had been determined.

It is well established that a party need only pursue its administrative remedies to the extent that it is reasonable to do so under the circumstances, particularly where time is short and the harm to be avoided would occur before complete administrative review could be achieved.

Thus, in Martinez v. Richardson, 472 F.2d 1121 (10th Cir. 1973), the Court stated:

"Nor will exhaustion of administrative remedies be required where it would result in irreparable harm. This is especially true where time is crucial to the protection of substantive rights and administrative remedies would involve delay. [citations omitted]"

Id. at 1125, n. 10

See also Comprehensive Group Health Services Board v. Temple University, 363 F. Supp. 1069, 1098 (E.D.Pa. 1973) (" . . . courts are particularly reluctant to insist on exhaustion when the harm to the complaining party increases with the passage of time."); Ogletree v. McNamara, 449 F.2d 93, 99 (6th Cir. 1971) ("We recognize, of course, that the federal courts do not require exhaustion of remedies when to attempt such exhaustion would obviously be futile or where irreparable damage is likely to occur in the meantime.").

In light of the above, and in view of the fact that there was jurisdiction to entertain Amrep's application in both the civil and criminal courts below, (see discussion at pages 39-43 infra), this Court should, at this time, review the validity

of the order of the Administrative Law Judge which requires Amrep to defend itself simultaneously in two on-going and massive proceedings.

Civil Jurisdiction

Judge Pierce had jurisdiction, in the civil action brought to review the validity of the FTC's orders, under the well-settled principle enunciated by this Court in Pepsico, Inc. v. Federal Trade Commission, 472 F.2d 179 (2d Cir. 1972), cert. denied, 414 U.S. 876 (1973), that "one can find 'final agency action [for purposes of review under §10(c) of the Administrative Procedure Act, 4 U.S.C. §704] for which there is no other adequate remedy in a court' if . . . a proceeding . . . is being conducted in a manner that cannot result in a valid order", 472 F.2d at 187 (emphasis added). See also Sterling Drug v. Weinberger, 509 F.2d 1236, 1239 (2d Cir. 1975); Ecology Action v. U.S. Atomic Energy Commission, 492 F.2d 998, 1001 (2d Cir. 1974); and New York Shipping Association v. Federal Maritime Commission, 495 F.2d 1215, 1220 n. 10 (2d Cir.), cert. denied, 419 U.S. 964 (1974).

As more fully set forth below, the requirements of simultaneous preparation and pre-trial proceedings in the criminal case and the resulting unavailability of the indicted officers' aid and assistance to the corporation make it clear that such requirements deny Amrep sufficient

time to prepare its FTC defense and thus preclude a valid result in the FTC proceeding.

Moreover, heeding the rule enunciated by the Supreme Court in St. Regis Paper Co. v. United States, 368 U.S. 208, 225-27 (1961), requiring a respondent who faces the threat of severe penalties for failure to comply with an FTC discovery order* to seek immediately a stay of the order, Amrep was required to seek relief from the District Court. However, Judge Pierce refused to pass upon the merits of Amrep's challenge to the validity of the FTC's orders.

Judge Pierce's denial of Amrep's motion to vacate his prior orders, preliminarily enjoin the FTC proceeding pending the outcome of the criminal trial and grant a temporary stay of the FTC discovery pending the determination of Amrep's motion, was based entirely upon his erroneous belief that Amrep's filing of a notice of appeal from his prior orders divested the District Court of jurisdiction and that, rather than proceeding under Rule 60(b), Amrep was required to file a new complaint in order to obtain the required relief (416a-418a). Judge Pierce expressly foreswore a determination on the merits of Amrep's motion (419a).

* Should Amrep fail to comply with the FTC discovery deadlines, it would be faced with one or more of the drastic sanctions set forth in Section 3.38 of the Rules of Practice of the Federal Trade Commission. In addition, Amrep would be subject to the threat of criminal penalties for failure to comply with the FTC discovery orders. See Section 10 of the Federal Trade Commission Act, 15 U.S.C. §50.

The decisions of this Court make it clear that Judge Pierce viewed his own powers and the scope of the relief obtainable under Rule 60(b) far too narrowly. Even if the filing of a notice of appeal technically divests the District Court of jurisdiction, this Court has stated that where an appellant believes that new facts or circumstances may give the District Court grounds to vacate a prior order, the proper procedure is to request the District Court to review its prior order in light of these new facts and circumstances before the Court of Appeals is asked to remand the case. Ryan v. United States Lines Co., 303 F.2d 430, 434 (2d Cir. 1962) ("Under this procedure, the district court is first to determine whether it would grant the motion; if it decides in favor of it, then and then only is the necessary remand by the court of appeals to be sought."); see also Bruno v. Herold, 368 F.2d 187 (2d Cir. 1966).

Moreover, despite the fact that certain new circumstances were presented to the District Court on Amrep's Rule 60(b) motion, these new circumstances did not render Amrep's motion so different from Amrep's prior application as to require it to file a new complaint. These circumstances either flowed from the indictment which was part of the record before Judge Pierce (e.g., the conflicting pre-trial and trial schedules set by the Administrative Law Judge and the criminal judge; Amrep's lack of representation

before the FTC) or were aggravated by that indictment (e.g., the unwillingness of Amrep's principal officers to risk self-incrimination and disclosure of their defense in responding to FTC discovery demands, preparing cross-examination of the FTC's witnesses or testifying at the FTC hearings).

Indeed, if Amrep had followed Judge Pierce's advice and filed a new complaint, it would have run the serious risk of dismissal on the grounds of res judicata since Judge Pierce's November 3 orders were based on a determination that the indictment did not constitute grounds for granting a preliminary injunction against prosecution of the FTC proceeding. Thus, Judge Pierce plainly erred in failing to even consider the application as properly before him.

Criminal Jurisdiction

It is equally clear that Judge Metzner had jurisdiction to protect the fairness and integrity of the criminal trial by enjoining the FTC proceeding which would interfere with Amrep's preparation and defense in the criminal trial. In United States v. Simon, 373 F.2d 649 (2d Cir.), judgment vacated as moot, 389 U.S. 425 (1967), this Court stated that the District Court presiding over a criminal case had the power "to take appropriate action" if proceedings in a concurrent civil action "threaten[ed] to interfere with the trial of the indictment or with such preparation of their defenses by the [defendants] as may be necessary". Id. at 654.

In United States v. Birrell, 276 F. Supp. 798 (S.D.N.Y. 1967), Judge Herlands reiterated the Simon rule that a federal criminal court has jurisdiction to enjoin concurrent civil proceedings in order to preserve the integrity of its own trial. Judge Herlands also observed that the criminal court could exercise such jurisdiction over persons who were not parties to the criminal action. Id. at 811.

Although Judge Metzner properly assumed jurisdiction of Amrep's application for a stay and enjoined the FTC from proceeding beyond July 30, 1976, he left uncorrected the basic injury to Amrep's rights in the criminal proceeding resulting from the continued prosecution of the FTC case through discovery and its case-in-chief. Moreover, since he was justifiably concerned only with the effect of the FTC orders on the criminal trial (428a), he never even passed upon the effect on the validity of the FTC proceeding of the FTC's attempt to force a trial of its case before the criminal trial.

POINT II

THE CONFLICT BETWEEN THE FTC AND CRIMINAL CASES REQUIRES A STAY OF THE FTC PROCEEDING

The courts have recognized that the conflict between parallel civil and criminal proceedings may be such that the interests of justice require that the civil action be stayed pending termination of the criminal trial. United States v. Kordel, 397 U.S. 1, 12 (1970); Gordon v. Federal Deposit Insurance Corporation, 427 F.2d 578, 580 (D.C. Cir. 1970); Silver v. McCamey, 221 F.2d 873 (D.C. Cir. 1955).

Thus, in United States v. Kordel, supra, the Supreme Court recognized that:

"Federal courts have deferred civil proceedings pending the completion of parallel criminal prosecutions when the interests of justice seemed to require such action, sometimes at the request of the prosecution [citations omitted]; sometimes at the request of the defense [citations omitted]." Id. at 12, n.27.

After reviewing the particular circumstances presented by the case before it, the Court concluded that the district court had not, in that case, erred when it denied the defendant corporation's application for a stay. The corporation had been served with interrogatories in a civil action then pending against it by the Food and Drug Administration. Shortly thereafter, and before it had served answers

to the interrogatories, the corporation and certain of its executives received a statutory notice stating that the FDA also contemplated bringing a criminal prosecution against them. The defendant corporation and those officers moved to stay the FDA proceeding pending the disposition of any criminal prosecution that might be brought.

The district court denied the motion, ruling that the corporation had failed to demonstrate that it would be harmed or prejudiced substantially if it were required to answer the interrogatories, since "the [statutory] notice did not conclusively indicate the Government would institute a criminal proceeding [and] six to 12 months could elapse from service of the statutory notice to initiation of a criminal prosecution . . ." Id. at 5. In fact, fewer than 10% of the matters involving the statutory notice reach the stage of either indictment or information. Id. at 4, n.5.

After the denial of its motion, the corporation (by one of the executives) served answers to the interrogatories. The civil proceeding was subsequently settled, but eight months after this settlement an indictment was returned against the corporation and the two executives, and the interrogatory answers presumably were used to obtain evidence against the defendants in the criminal trial.

The Supreme Court held that neither of the convicted executives had suffered a violation of his Fifth Amendment rights because the executive who had actually answered the interrogatories on behalf of the corporation need not have done so ("Without question he could have invoked his Fifth Amendment privilege against compulsory self-incrimination." Id. at 7). Thus, the Court ruled: "His failure at any time to assert the constitutional privilege leaves him in no position to complain now that he was compelled to give testimony against himself." Id. at 10.

The Court found that there was no per se or automatic rule by which to decide whether a stay of the civil or the criminal proceeding is required. Thus, the Court declined to "require a governmental agency . . . invariably to choose either to forego recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial." Id. at 11 (emphasis added).

However, neither did the Court hold that simultaneous civil and criminal proceedings must always be allowed to proceed. To the contrary, the Court indicated that it was proper to consider "any other special circumstances that might suggest the unconstitutionality or even the im-

propriety of [a] criminal prosecution" after a civil action had been instituted. Id. at 12.

Thus, the Supreme Court in Kordel left it open for this Court to focus upon the enormous problems not involved in Kordel but which are faced by Amrep. Here both the civil and criminal actions arising from the same activities are pending simultaneously with conflicting pre-trial dates. In Kordel the criminal case was a speculative possibility in the future when the stay of civil proceedings was denied. There was no actual conflict between them at all.

Moreover, since the individual officer defendants in Kordel did not invoke their privilege against self-incrimination, the Supreme Court was not required to resolve the problems presented to Amrep here by the unavailability of testimony and other assistance from its chief officers in the civil proceeding. Indeed, it indicated that were relevant evidence unavailable from officers who feared self-incrimination, it was willing to "assume that in such a case the appropriate remedy would be a protective order under Rule 30(b), postponing civil discovery until termination of the criminal action." Id. at 9.

Thus, the Supreme Court decision in Kordel merely holds that there is no automatic or invariable rule requiring deferral of a civil proceeding when similar criminal charges

may be contemplated and that the privilege against self-incrimination is not violated when it is not claimed. It also holds that a stay of civil proceedings should be granted in a proper case, including cases in which problems of self-incrimination prevent a fair trial.

An examination of the circumstances of the instant case leads ineluctably to the conclusion that the simultaneous prosecution of the FTC and criminal proceedings will result in extreme prejudice to Amrep. If Amrep is required to submit to FTC discovery demands and to FTC hearings during the time allotted for preparation of its criminal defense, then the validity of both proceedings will be threatened.

Amrep Cannot Adequately Defend Itself in the FTC Proceeding While the Criminal Indictment is Pending

The indictment of Amrep's principal officers (including its chief counsel in the FTC proceeding), the severely compressed discovery and hearing deadlines imposed by the FTC in its attempt to try the administrative proceeding before the criminal trial starts, Amrep's inability to retain new counsel because of the impossibility of meeting the deadlines, and the enormous time and effort required for preparation of the criminal trial, have rendered it impossible for Amrep to defend itself adequately before the FTC.

Moreover, the propriety of the FTC orders resulting

in such prejudice to Amrep has never been determined by the FTC (the Administrative Law Judge referred the matter to the Commission, which has not yet acted) or by the Federal Courts. Judge Pierce denied Amrep's applications for relief without passing on their merits and Judge Metzner focused only on the effect of the FTC orders on the criminal trial.

Amrep is Without Counsel Before the FTC

The indictment of Amrep's general counsel, Solomon H. Friend, who had been in charge of Amrep's defense in the FTC proceeding from its inception in April 1973 until his indictment on October 28, 1975, has left Amrep without representation in that proceeding. For the past two months Amrep has been actively seeking new counsel but thus far has been unsuccessful. Three law firms* have concluded that, in view of the size and complexity of the FTC proceeding, they could not possibly prepare and try the case during the first half of 1976, as the FTC schedule now requires. See White v. Ragen, 324 U.S. 760, 764 (1945) ("it is a denial of the accused's constitutional right to a fair trial to force him to trial with such expedition as to deprive him of the effective aid and assistance of counsel.").

* These law firms are: Proskauer Rose Goetz & Mendelsohn; Simpson Thacher & Bartlett; and Weil Gotshal & Manges. (See affidavit of Edward B. Winslow, Esq., submitted to this Court in support of Amrep's motion dated January 20, 1976 for an injunction pending appeal.)

The FTC does not dispute that Mr. Friend had primary responsibility for Amrep's defense or that his indictment has made it impossible to continue in that capacity. Rather, the FTC's "solution" to Amrep's problem is to require Amrep to substitute as its lead counsel two of Mr. Friend's assistants. Such a "battlefield commission" is hardly an appropriate way to conduct a major litigation, especially in view of the fact that Amrep never contemplated that any of these lawyers would be in charge of its defense. Thus, it would be highly improper for the FTC to impose upon Amrep lead counsel not of its own choosing.

Amrep Cannot Comply with the FTC Schedule

As three law firms have already recognized, the deadlines imposed by the FTC leave Amrep insufficient time to respond to discovery demands or prepare for hearings. Although the FTC has been investigating the matter for almost three years and has estimated that it will require three months to present in case-in-chief, the schedule imposed by the Administrative Law Judge: compresses remaining discovery into a two and one-half month period at a time when Amrep is without counsel in that proceeding; precludes meaningful discovery by Amrep; and fixes the commencement of trial for 30 days after Amrep is to receive a witness list containing 150 names. The requirements of simultaneous preparation

and pre-trial proceedings in the criminal case make it clear that such a schedule denies Amrep sufficient time to prepare its defense and precludes a valid result.

Thus, after two and one-half months of intense discovery and preparation for the FTC hearings (see discussion at pages 23-25, supra), Amrep is then to be occupied with three months of actual hearings for presentation of the FTC case-in-chief in seven cities in New Mexico, Missouri, Florida and New York. If the FTC proceeding is permitted beyond the case-in-chief, then Amrep must prepare its own case in the minimal time of six weeks permitted by the Administrative Law Judge and thereafter present its defense and cross-examine rebuttal witnesses in additional hearings estimated to require two months.

The Commission has offered no explanation for these inordinately short deadlines. There was no such urgency shown by the Commission during the two and one-half year prior to the indictment, during which it engaged in desultory investigative proceedings and post-complaint discovery. The Commission's primary motivation seems to be to try its case before the United States Attorney can try the criminal case, regardless of the resulting prejudice to respondent.

We are informed that in another substantially similar FTC proceeding, in which the complaint was issued

on the same day as that against Amrep, the Commission has not as yet set a trial date. Thus, in the Matter of Horizon Corporation, Docket No. 9017, the Commission has also challenged the policies and practices of a corporation engaged in the sale of land for use as homesites and has also filed a proposed order seeking disclosure virtually identical to that sought against Amrep. In fact, the Commission called a joint press conference to announce the issuance of the "twin complaints". BNA Antitrust & Trade Regulation Report No. 705 at A-24 - A-26 (March 18, 1975).

However, despite the admitted similarities between the Horizon and Amrep cases (Id. at A-25), and the fact that the complaints were both issued on the same day, the FTC has not sought to impose a compressed discovery and hearing schedule on Horizon, as it has on Amrep. Thus, we are informed that, to date, the only post-complaint discovery in the Horizon case has been the issuance of one subpoena by the FTC. Horizon has not yet had its discovery, and there has been no discussion whatsoever with respect to the fixing of hearing dates.

The FTC's arbitrariness in attempting to enforce its impossible time schedule without regard to Amrep's ability to comply is particularly prejudicial in view of the fact that, if successful, the end result of the FTC proceeding will be to prevent Amrep from conducting its business and/or to bring about the insolvency of this public company. Thus, in addition

to the restitution being sought, the FTC's proposed order would require Amrep to advise prospective purchasers of its land that "there is virtually no resale market for this land" (23a) and that such land "has virtually no use at present or in the foreseeable future" (32a).

Despite Judge Metzner's view that the individual indictees would not be totally involved in preparation for the criminal trial until he renders decisions on Amrep's discovery motions in April (487a), it is clear that during the next two months these individuals will be required to devote a major portion of their time to criminal preparation. Thus, after the date of Judge Metzner's January 15 decision, the defendants learned that commencing in early February, the Government would make available to them the grand jury testimony of 35 witnesses as well as the thousands of pages of documents which the Government will use at trial. Clearly, it will be necessary for each of the individual defendants to review this material with their attorneys, especially in light of the fact that the documents to be provided contain statements of several of the defendants.

While this time-consuming task is being done, other important pre-trial preparation must continue. Thus, it will be necessary for the individual defendants to aid in identifying, locating, and choosing the many prospective witnesses which their attorneys will have to interview and prepare as

part of the defense case. Moreover, it is essential that the major portion of all of this crucial preparation be accomplished prior to April, when Judge Metzner will decide what additional discovery the defendants will receive. At that point, the attention of these individuals must necessarily turn to reviewing this new material.

The Indictment of Amrep's Principal Officers Deprives It of the Ability to Present Its Best Defense Before the FTC

In addition to the loss of counsel and the compressed time schedule imposed by the FTC, Amrep's ability to respond to discovery demands, prepare cross-examination of FTC witnesses, and secure the testimony and other assistance necessary to present its defense has been fundamentally impaired by the indictment of its principal officers.

Not only will these officers of necessity be devoting a major portion of their time to preparation of their defenses in the criminal case, but they will also be loathe to provide information necessary to respond to discovery demands for fear of waiving their Fifth Amendment privilege against self-incrimination. Moreover, they must also be concerned that any aid they furnish in the preparation of cross-examination of the FTC witnesses will give the United States Attorney a preview of cross-examination in the criminal case.

Similarly, the individual indictees cannot testify in Amrep's defense without waiving their privilege against self-incrimination. Nor is it likely that the Government will grant them use immunity with respect to such testimony because it would have to meet the burden of proving independent sources of all its evidence. Kastigar v. United States, 406 U.S. 441 (1972). Obviously, the corporation's top officers are the best source of testimony in defense of the basic policies and practices of the corporation which are being challenged in the FTC proceeding and, if Judge Metzner's order is reversed and Amrep is forced to present its FTC defense prior to the criminal trial, then this vital testimony will be unavailable to it.

Furthermore, the information sought by the FTC discovery demands is such that responses thereto cannot be expected to be complete without the knowledge of Amrep's principal officers. (See discussion at pages 27 to 31, supra) Indeed, these are the very men which the Government has indicted as being those most responsible for the formulation and implementation of the policies and practices being challenged by the Government. Thus, their unavailability greatly prejudices Amrep in its defense of the FTC proceeding.

In a situation not unlike that presented here, a federal court stayed a criminal trial until pending criminal charges against the defendants' only potential witnesses could be tried. United States v. Hasiwar, 299 F. Supp. 1053 (S.D.N.Y.

1969). It issued the stay until those potential witnesses could be relieved of their fear of self-incrimination and were free to testify.

In finding that the defendants were, in fact, entitled to a stay, the court stated:

"At least one of these witnesses has indicated that he would, if called, exercise his privilege against self-incrimination, but that he would be willing to testify once the charges against him had been disposed of, whatever the disposition. It is believed that testimony favorable to defendants can be elicited from these witnesses. It seems highly probable, under the circumstances of this case, that these witnesses would all be compelled to exercise their privilege and refuse to testify on behalf of these defendants prior to the trial of the narcotics case. The Government has come forward with no valid reason for the order of trial of these cases upon which it has embarked."

Id. at 1057 (emphasis added).

The court then concluded:

"In the instant case, what little prejudice, if any, there may be to the government in delaying this prosecution until such time as there is a disposition of the narcotics case can hardly compare to the extreme prejudice that would be suffered by the defendants herein if they were effectively deprived of their only prospective witnesses."

Id.

As in Hasiwar, the Government has offered no explanation whatsoever for the order in which it has chosen to proceed here. Indeed, as more fully explained in Point III, infra, any claim that the public interest requires that the FTC hearings commence prior to the criminal trial is affirmatively rebutted by the FTC's own delay, as well as by the several remedies presently available for protection of the public interest if that were deemed necessary.

The Validity of the Criminal Trial is Jeopardized
by the Pendency of the FTC Proceeding

Not only have the FTC orders denied Amrep a fair opportunity to defend itself before the FTC, but they have also so hindered Amrep's ability to prepare and present its best defense in the criminal trial as to jeopardize the validity of that proceeding as well.

The Demanding Requirements of the FTC Schedule Preclude
Adequate Preparation for the Criminal Case

Although Judge Metzner ordered that the FTC hearings be stayed after July 30, 1976, this leaves Amrep only two unobstructed months to prepare for a criminal trial scheduled to begin October 5, 1976 and estimated to last three to four months. As shown above, the remaining six months would be entirely consumed in attempting to comply with the unreasonably demanding FTC schedule of discovery, preparation and trial outlined above. (See discussion at pages 22-26, supra).

Moreover, if even the limited relief granted by Judge Metzner is reversed, then Amrep will be required to prepare and present its FTC defense immediately prior to, and probably during, the criminal trial. Even the inadequate two months he reserved for criminal preparation would be eliminated.

It is respectfully submitted that if the individual indictees are compelled to divide their time between preparation of their own criminal defenses, preparation of Amrep's FTC defense and participation in FTC hearings, and preparation

of Amrep's criminal defense, then they will be unable to provide adequate assistance to counsel with respect to each of these matters. Thus, Amrep's criminal defense will inevitably be so impaired as to invalidate the criminal trial.

Moreover, even if other Amrep employees are available to aid in preparation and trial of the FTC and criminal cases, this still does not solve Amrep's problem. People involved in the preparation as to one proceeding -- whether they be the individual indictees or others -- will be largely unavailable to aid in preparation with respect to the other proceeding. Thus, to the extent that Amrep is forced to meet the FTC's schedule, it is being denied sufficient time to prepare its criminal defense.

It has been recognized that problems of actually conflicting requirements for preparation and trial constitute grounds for a stay. Thus, in Texaco v. Borda, 383 F.2d 607 (3d Cir. 1967), the Third Circuit recognized that the conflict between actually pending civil and criminal trials need not be as acute as the conflict herein before a stay is warranted. It affirmed a stay of proceedings in a civil action in which discovery had been sought until the Government's criminal antitrust action against the same defendants had been completed. The Court of Appeals quoted the lower court's reason for issuing the stay approvingly as follows:

"Upon a consideration of all factors involved in this case . . . a balancing of the equities . . . justify a stay, at least

until after a trial of the criminal action. The indicted defendants should not be unduly hampered, as I believe they would be if they had to fight on two fronts at the same time. We are not dealing here with the ordinary run-of-the-mill litigation. We are dealing with an anti-trust suit covering alleged illegal activity in a three-state area, going back many years." Id. at 608-09.

As in Texaco, the proceedings here are also not "ordinary run-of-the-mill litigation" and the defendants will be equally hampered to an impermissible degree "if they had to fight on two fronts at the same time." Similarly, in United States v. Simon, 262 F. Supp. 64 (S.D.N.Y. 1966), the District Court granted a motion, made by several defendants then under indictment, to stay the taking of their depositions in a related civil action. On appeal, the stay order was reversed. However, this Court reversed on the express grounds that a date for the criminal trial had not been set and that defendants had been unable to show that the taking of their depositions in the civil action would interfere with the preparation for the criminal trial in any way. United States v. Simon, 373 F.2d 649, 650 (2d Cir.), judgment vacated as moot, 389 U.S. 425 (1967).

However, the District Court was expressly authorized to take appropriate action if defendants could demonstrate that the depositions would interfere with the trial or with preparation for the trial:

"Of course, if the district court should find that the taking of the deposition of the appellees threatens to interfere with the trial of the indictment or with such preparation of their defenses by the appellees, as may be necessary, the district court has the power to take appropriate action."

Id. at 654.

In the instant case, a date has been set for the criminal trial. Moreover, the facts set forth above clearly demonstrate that Amrep cannot possibly prepare for a criminal trial that is expected to last approximately three to four months while it simultaneously prepares for and defends a massive FTC action involving the same charges.

Amrep will be Required to Disclose Information and to Give a Preview of its Defense to the United States Attorney

Judge Metzner's decision completely ignores the fact that if Amrep is required to respond to the FTC discovery demands, then the United States Attorney will obtain in the criminal proceeding discovery to which it would not otherwise be entitled under the Federal Rules of Criminal Procedure. In addition, allowing the FTC case-in-chief to proceed prior to the commencement of the criminal trial will necessarily give the United States Attorney a preview of Amrep's cross-examination of the FTC's witnesses. Moreover, if Judge Metzner's order is reversed and Amrep must, in addition, present its defense prior to the criminal trial, then the United States

Attorney will be the beneficiary of a complete "dress rehearsal" of Amrep's defense.

In Silver v. McCamey, 221 F.2d 873 (D.C. Cir. 1955), the court stayed a pending civil action after it found that the civil and criminal actions both related to the same charges. The defendant faced a criminal trial on a charge of rape. He also faced an administrative proceeding to revoke his license to operate a taxicab on the same charge. The Court of Appeals affirmed the lower court's decision to stay the administrative hearing, stating:

"We agree with the District Court that due process is not observed if an accused person is subjected, without his consent, to an administrative hearing on a serious criminal charge that is pending against him."

Id. at 874-75.

The court further stated that the civil action should be stayed because the defendant's "necessary defense in the administrative hearing may disclose his evidence long in advance of his criminal trial and prejudice his defense in that trial." Id. at 875.

Moreover, the Court noted that if it were necessary, the public interest could be protected in the interim by action similar to the injunctive remedy available to the FTC in the instant case. Thus, the Court stated that the

defendant's license could be suspended by the administrative board pending the criminal proceeding. Id.

In Campbell v. Eastland, 307 F.2d 478 (5th Cir. 1962), cert. denied, 371 U.S. 955 (1963), Judge Wisdom stated the problem as follows:

"There is a clear-cut distinction between private interests in civil litigation and the public interest in a criminal prosecution, between a civil trial and a criminal trial, and between the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure.

* * * *

While the Federal Rules of Civil Procedure have provided a well-stocked battery of discovery procedures, the rules governing criminal discovery are far more restrictive. Compare Rules 26 through 37, Fed.R.Civ.P., 28 U.S.C.A. with Rules 15, 16, and 17, Fed.R.Crim.P., 18 U.S.C.A. Separate policies and objectives support these different rules.

* * * *

The very fact that there is a clear distinction between civil and criminal actions requires a government policy determination of priority: which case should be tried first. Administrative policy gives priority to the public interest in law enforcement."

307 F.2d at 487.

The question whether a civil action should be stayed pending the outcome of a criminal trial typically arises when a defendant fears that his responses to interrogatories or deposition questions before trial or his testimony at the

civil proceeding may be used against him in the criminal proceeding. Faced with an application for a stay in such a situation, courts generally have held that the rights of a defendant can be protected even as the civil proceeding goes forward. They have ruled that a defendant can, and should, invoke his Fifth Amendment right to remain silent in the civil proceeding and thus avoid making any statements that later can be used against him in the criminal proceeding. See, e.g., United States v. Kordel, supra.

In United States v. Simon, supra, this Court reached a similar conclusion. The lower court had stayed the taking of depositions in a civil action pending termination of a related criminal proceeding in which the parties whose depositions had been sought were defendants. This Court reversed, holding that the defendants were adequately protected by their constitutional right to invoke the Fifth Amendment privilege against self-incrimination. It reasoned that this right protected defendants from being compelled to divulge information that could be used against them in the criminal trial and that a stay therefore was unnecessary. 373 F.2d at 652.

In reaching its decision, the majority of this Court largely ignored an issue that troubled the lower court and the dissent, and which plagues Amrep in the case at bar. The Simon defendants contended that they could not go forward with the civil proceeding without prejudicing their defense

at the criminal trial. They argued that since the civil and criminal proceedings dealt with the same activities, they would not be able to answer questions at their depositions without revealing the nature of the defenses that they would assert at the criminal trial. The trial court accepted their argument, stating:

"If there is reasonable probability that either the prosecution or the defense will be able to secure a full disclosure of the other side's case while relying on the [Federal] rules [of Criminal Procedure] to prevent disclosure of its own, there is, as I view it, unfairness likely to affect the result of the trial of such importance and significance as to require the intervention of the criminal court to ensure the fair administration of criminal justice and the rules governing it."

262 F. Supp. at 73-74.

Ultimately, this Court was not required to resolve the argument advanced by the defendants because it ruled that the defendants could continue to protect their criminal defense by invoking their right to silence. "If appellees choose not to assert their privilege against self-incrimination" because of what this Court found was unjustified concern for the effect on their professional reputations, then the disclosure which becomes available to the prosecutor, this Court held, "is merely the natural byproduct of another judicial proceeding". 373 F.2d. at 652. Such discovery does not impair defendants' rights; "they are in suspension because the ap-

pellees have not chosen to avail themselves of their Fifth Amendment privilege". Id. at 652.

As a corporation, Amrep has no right against self-incrimination, Curcio v. United States, 354 U.S. 118, 122 (1957) and Wilson v. United States, 221 U.S. 361 (1911), and the unilateral discovery by the Government here, which will occur if the FTC proceeding is permitted to continue, is not the result of any unwillingness, on insufficient grounds, to claim it.

This Court in Simon recognized that, if the privilege were unavailable, then a different case would be presented. The defendants there claimed that they had waived the privilege by testimony given before the indictment and that it was therefore unavailable to them as a means of preventing discovery.

This Court did not hold that if the privilege were unavailable, defendants must suffer the prejudice to their defense resulting from the prior testimony. It held, instead, that there was no waiver to be inferred from such prior testimony. Thus, defendants in Simon had a means of protecting their rights against unilateral discovery of their defenses to the criminal charges, and chose not to assert it on grounds this Court found insubstantial. This Court refused to protect them against the consequences of such a course of conduct if they chose to continue it.

This Court also noted that the discovery proceedings in the pending civil suit by a private party, not a federal agency, were not discovery which the government had initiated or promoted, as they would be here.

Finally, this Court's analysis was based on the fundamental premise that it must "balance" defendants' interest in not claiming their Fifth Amendment rights while still avoiding discovery against the need for "expeditious progress". 373 F.2d at 652. Here this need can be accommodated, to the extent any public interest requires relief in the FTC proceeding before the criminal case can be concluded, by the issuance of preliminary injunctive relief. Despite the length of time the FTC proceeding has been pending, the Commission has never sought such relief and, indeed, has decided that it is unnecessary unless Amrep appears to be dissipating its assets.

Judge Feinberg dissented vigorously even from the majority's limited refusal to recognize the "fundamentally unfair" procedure of permitting one-sided discovery by allowing the civil suit to continue. Apparently recognizing the seriousness of the issue presented, the Supreme Court granted certiorari, 386 U.S. 1030 (1967), but the issue became moot and the judgment was vacated, thus precluding a final determination of the issues presented.

Unless the FTC proceeding is stayed, Amrep will be forced to provide the United States Attorney with unilateral discovery and a "dress rehearsal" of its cross-examination in the criminal action. It will not simply be required to answer a few interrogatories as was the case in United States v. Kordel, supra, or attend a deposition, as was the case in United States v. Simon, supra. Instead, it will be required to respond to massive discovery requests and participate in a hearing of many months duration during which it will have to cross-examine 150 witnesses whose testimony will be presented to substantiate charges virtually identical to those contained in the indictment. Moreover, if Judge Metzner's order is reversed, then Amrep will be forced to give the United States Attorney a complete preview of its defense to these charges.

Thus, if permitted to proceed, the FTC case will so infect the criminal case with unfairness, by depriving Amrep of adequate time to prepare and by providing the prosecutor with an extensive preview of Amrep's defense, as to gravely impair the validity of any verdict. Similarly, because of the inordinate rush necessary if the FTC is to win its race with the criminal trial date or the July 30 cut-off date and because of the impairment of Amrep's ability to defend the FTC proceeding resulting from the indictment of its counsel and its principal officers, prosecution of the FTC proceeding under such circumstances similarly cannot result in a valid order.

Judge Metzner's compromise of half of the FTC prosecution before the criminal trial and half afterward neither saves the simultaneous prosecutions from these probably fatal defects nor significantly advances the conclusion of the FTC case, which is still put over well into 1977.

There are, however, measures which, we believe, can fairly accomplish both objectives and which also provide appropriate remedies if the FTC's newly-discovered sense of urgency has any basis in fact.

POINT III

A STAY OF THE FTC PROCEEDING WILL NOT JEOPARDIZE THE PUBLIC INTEREST

No claim can be made that the public interest requires an immediate resolution of the pending FTC proceeding. First, the Commission's leisurely prosecution of the FTC case prior to the return of the indictment affirmatively shows the lack of urgency now claimed to exist. Secondly, the FTC (along with at least one other federal agency), has at its disposal the remedy of injunctive relief to protect the public interest, and its failure to seek such relief further demonstrates a lack of urgency. Finally, and of greatest importance, is the fact that the public interest can best be served, both in terms of expedition and conservation of governmental resources, if the FTC proceeding is stayed until after the

criminal trial by an injunction conditioned upon the parties' agreement to permit appropriate use of the criminal transcript as evidence in the FTC case.

The Commission's recent claim of urgency is clearly at odds with its heretofore leisurely prosecution of the Amrep matter. Thus, while the investigation was initiated in early 1973, no complaint was issued until March 11, 1975. During nine months of this interim period, from June 1974 to March 1975, while the Commission was considering Amrep's first motion for a stay, the entire investigation came to a halt. In fact, only after the criminal indictment was returned did the Administrative Law Judge set an impossibly short discovery and hearing schedule, in an apparent attempt to reach a decision prior to the criminal trial. Thus began the unseemly bureaucratic race between two government agencies that is at issue here.

If the public interest is deemed to require interim relief, the Commission is not without a remedy. The FTC may seek a preliminary injunction against Amrep's alleged unfair acts, as it is authorized to do under 15 U.S.C. §53(b) when such an injunction "would be in the interest of the public". Judge Metzner noted that the availability of this procedure sufficiently insulates future land purchasers from any harm which might be occasioned by a stay (465a).

Furthermore, the Commission's failure to pursue this remedy throughout the period of its two and one-half year investigation belies its very recent concern that the public requires immediate protection from Amrep's allegedly unfair practices. The Commission has offered no explanation here for its failure to employ this most powerful means to protect the public, other than that such decisions are "a matter of administrative discretion" governed by unspecified "policy and tactical" considerations (401a-402a).

The FTC's injunctive power is not the only remedy available. The business of interstate land sales is a highly regulated industry, subject to control by the Department of Housing and Urban Development ("HUD") under the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §1701, et seq. This comprehensive regulatory scheme, similar in operation to the Securities and Exchange Act is designed to insure full disclosure of all relevant facts to land purchasers and to prevent fraud and deception. It requires that a land developer file a "statement of record," similar to an SEC prospectus required in connection with the sale of securities. 15 U.S.C. §1705.

Not only may the HUD Secretary seek an injunction of any violation of the Act (§1714(a)), but a land developer such as Amrep may also be summarily suspended from selling land if the "statement of record" contains any untrue statements

of material facts or omits any material facts required by the Act to be disclosed. 24 C.F.R. §1710.45. Therefore, should HUD conclude at any time that Amrep has failed to make full disclosure to the public, it has a powerful and expeditious method of correcting Amrep's action -- a method that it has not hesitated to use in the past. (See discussion at pages 34-35, supra).

Thus, the Commission's desire to try its own proceeding before the criminal case, whatever the unfairness to respondent, cannot hinge upon a necessity to stop Amrep's present practices immediately. If there were such an urgent need, there are ample means to obtain such relief much more promptly than through an FTC cease and desist order.

In addition, the Commission has expressly disavowed any claim that there is any need for urgent relief to protect its ultimate ability to obtain restitution for land purchasers pursuant to 15 U.S.C. §57(b). This recently enacted statute provides that the Commission may commence a civil action in federal or state court for consumer redress, including the refund of money or the payment of damages. At this second trial, the Commission must "satisf[y] the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent" (15 U.S.C. §57(b)(a)(2))

But the FTC has announced publicly that it sees no need to seek urgent relief with respect to the ultimate possibility of consumer restitution. At a press conference called to announce the filing of the FTC complaint against Amrep, the Director of the FTC's Bureau of Consumer Protection, Thomas Rosch, announced that Amrep had a net worth of \$46,000,000, which was sufficient to support a substantial restitution award. Mr. Rosch further stated that injunctive relief to "freeze" Amrep's assets would not be warranted unless and until Amrep were to dissipate its resources. BNA Antitrust & Trade Regulation Report No. 705, at A-25 (March 18, 1975). There is no claim here that such dissipation has occurred or is likely to occur in the future.

Thus the public interest is amply protected by the availability of injunctive remedies which the FTC has decided thus far are unnecessary. If a stay of its proceeding or any other circumstances leads it to a different conclusion, these remedies, which do not involve a complete disregard of Amrep's rights to fair trials in both the FTC and criminal proceedings, are always available to it.

Moreover, a stay ordered upon certain conditions may greatly expedite, rather than prolong, the FTC proceeding. Under Judge Metzner's order, the prosecution of the FTC case must be adjourned after completion of the case-in-chief. The Government will then present what will presumably

be, in large part, the same case-in-chief in the criminal trial. Amrep will present its criminal defense and a month later will present much the same defense in the second half of the FTC case. This procedure results in the Government going forward with two successive presentations of the case-in-chief against Amrep and Amrep making two successive presentations of its defense -- a useless and wasteful procedure which, for the reasons outlined in Point II, will probably invalidate both proceedings.

If a complete stay of the FTC proceeding were granted by this Court, a full transcript of both the case-in-chief and the defense would be available at the conclusion of the criminal trial for use in the subsequent FTC proceeding. The witnesses would already have been subject to cross-examination. If such a transcript did not completely obviate the need for discovery and live presentation of the FTC case-in-chief and Amrep's defense it would so simplify and shorten the FTC proceeding that little or no time would have been lost as a result of the stay. Similarly, any subsequent restitution action would also be greatly expedited.

This Court may, and in the interest of fair and efficient judicial administration of these complex proceedings should, order a complete stay of the FTC proceeding conditioned upon the parties' agreement to permit appropriate use of the criminal transcript as evidence in the FTC case and the res-

titution action. Thus, the duplication inherent in the effect of Judge Metzner's order will be totally eliminated, both in the FTC proceeding and in any subsequent action for restitution, and the expedition sought may be fairly accomplished.

CONCLUSION

For the foregoing reasons, Amrep respectfully requests that the proceeding before the FTC be stayed pending termination of the criminal action pending against it in the United States District Court for the Southern District of New York.

Dated: New York, New York
February 2, 1976

Respectfully submitted,

Proskauer Rose Goetz & Mendelsohn
Attorneys for Appellant
Amrep Corporation
300 Park Avenue
New York, New York 10022
(212) 593-9000

Of Counsel:

Morton M. Maneker
Steven S. Miller
Mark Walfish

United States Court of Appeals
For the Second Circuit

Index No. 76-6008
76-6013
76-1028

Amrep Corp, Appellant

v

Federal Trade Commission, Appellee

XXXXXX
Plaintiff

Assist
XX

United States of America,

v

Amrep Corporation, et.al.

Defendant
XXXXXX

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK, COUNTY OF New York

SS.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at

35 Top O' the Ridge Dr. Scarsdale, New York 10583

That on February 2nd 1976 deponent served the annexed (2) Brief of
Appellant

on Barry Morris, Esq.


XXXXXXXXXX Office of the General Counsel

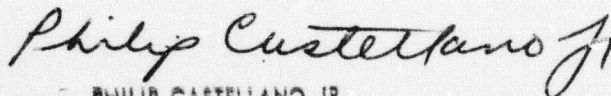
in this action at Federal Trade Commission Washington, D.C. 20580

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in-XXXXXX-official depository under the exclusive care
and custody of the United States Postal Service within the State of New York.

Sworn to before me

February 2nd, 1976


The name signed must be printed here.
Sandy Levitt



PHILIP CASTELLANO JR.
NOTARY PUBLIC, State of New York
No. 30-4504329
Qualified in Nassau County
Cert. filed in New York County
Commission Expires March 30, 1977